No. 83-892

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CALIFORNIA STATE DEPARTMENT OF EDUCATION; CALIFORNIA STATE BOARD OF EDUCATION; AND SUPERINTENDENT OF PUBLIC INSTRUCTION,

Petitioners,

vs.

LOS ANGELES BRANCH NAACP, BEVERLY HILLS-HOLLYWOOD NAACP;SAN PEDRO-WILMINGTON NAACP; WATTS NAACP;SAN FERNANDO VALLEY NAACP; AND CARSON NAACP,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF OF NAACP RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Did the Court of Appeals for the Ninth Circuit err in holding that the Equal Education Opportunities Act of 1974, 20 U.S.C. §§1701-1758, abrogates California's immunity from suits in the federal courts under the Eleventh Amendment of the United States Constitution?

II

Did the Court of Appeals for the Ninth Circuit err in holding that certain state educational officers and agencies, alleged to be causally related to the creation and perpetuation of de jure segregation in a public schools system, were proper parties for a federal school desegregation case, despite their claim of sovereign immunity under the Eleventh Amendment of the Constitution of the United States?

STATEMENT OF THE CASE

This is a school desegregation case involving the historic establishment, perpetuation and expansion of school segregation in Los Angeles, California, the nation's second largest school district. The action is a class action, brought by the six metropolitan branches of the NAACP, on behalf of a large class of black students attending the schools in the Los

Angeles Unified School District. The defendants are public officials at two levels of government, hereafter termed "the local defendants" and "the state defendants", respectively. The local defendants are the Los Angeles Unified School District, the Board of Education of the City of Los Angeles and the Los Angeles Superintendent of Schools, in his official capacity. The state defendants are the California State Board of Education (hereafter, "the SBE"), California Department of Education (hereafter, "the SDE"), and the California Superintendent of Public Instruction, in his official capacity (hereafter, "the SPI"). The First Amended Complaint also included the Governor of California. However, the District Court ordered dismissal of the Governor as a defendant and the Ninth

Circuit Court of Appeals affirmed the dismissal. 1/

The complaint before the district court was filed on April 15, 1981 and was, subsequently, amended on August 16, 1981. The complaint seeks declaratory and prospective injunctive relief against the defendants on the basis of their purposeful, concerted and independent participation and responsibility for creating, actively condoning, expanding, and maintaining a racially dual school system in Los Angeles in violation of the United States Constitution.

Petitioner state defendants' first attack on the subject matter jurisdiction of the federal courts to act on the complaint was by joint motions

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1/ No further appeal is taken from that dismissal and the matter is final.

to dismiss under Rule 12, Fed. R.Civ.P., attacking the complaint on grounds of its failure to allege any case or controversy under Article III and its inclusion of allegations of wrongdoing and harm by agencies and officers entitled to invoke the Eleventh Amendment soverign immunity of the State of California.

Upon renewed hearing after one amendment of the complaint, the district court ruled that the complaint should be dismissed as to the state defendants for different reasons. It held that the action was barred against the SBE and SDE, as agencies of the state, because of the sovereign immunity of the Eleventh Amendment. It held, further, that the action was barred under Article III, against the SPI and Governor because of a perceived failure by the plaintiffs to allege any case or controversy capable of remedy by these defendants through the court. (Sup-

plemental Appendix, pp. 24 - 25.) On appeal to the Ninth Circuit Court of Appeals, the subject matter jurisdiction issues were reargued with plaintiffs invoking the jurisdictional basis of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 et seq. (hereafter, "the EEOA"), in addition to the First, Ninth, Thirteenth, and Fourteenth Amendments to the United States Constitution and federal enforcement statutes, including 42 U.S.C. §§1981, 1983, 1988 and 2000d; 28 U.S.C. §§1331, 1343(3) and 1343(4); and 28 U.S.C. §§2201 and 2202.

The Court of Appeal reversed the judgment of the district court, except for the judgment dismissing the Governor. It remanded the case for further pre-trial action. The court below resolved the Article III issues when it found "that the NAACP had alleged actual injury traceable to the actions of the state defendants."

Further, it held that the Eleventh Amendment immunity of California agency defendants, including the SPI, has been abrogated by Congress' adoption of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§1701 et seq. (714 F.2d at p. 951) Finally, it held that the "NAACP does not seek retrospective damages from the Superintendent, and does not contravene the Eleventh Amendment bar against such action." (citing **Edelman v. Jordan,** 415 U.S. 651 [1974]). (714 F.2d at p. 952)

Rather than answering the complaint, petitioners applied for review of the order below, on writ of certiorari.

SUMMARY OF ARGUMENTS

1. The petition should be denied since it does not present a serious question of constitutional law not appropriately resolved in the courts below. First, the Ninth Circuit reading of the

language, purpose and intent of the Equal Educational Opportunities Act, 20 U.S.C. §§1701 et seq., as effective to abrogate state immunity, is competent and not in conflict with any decision of this Court. Second, the EEOA clearly permits individual actions against state education agencies. The court's analysis is consistent with and controlled by **Fitzpatrick v. Bitzer**, 427 U.S. 445 (1976) and **Hutto v. Finney**, 437 U.S. 678 (1978).

2. Regardless of whether subject matter jurisdiction in this case can be based on 20 U.S.C. §1701 et seq., the Eleventh Amendment is not a bar to a federal school desegregation case against state authorities, because those actions are actions for prospective injunctive relief, only ancillarily affecting state treasuries. This case is controlled by this Court's unanimous decision in **Milliken v. Bradley**, 433 U.S. 267 (1977).

REASONS FOR NOT GRANTING REVIEW

1. The Petition Does Not Present a Serious Question of Constitutional Law Not Appropriately Resolved Below.

The petition should be denied since it does not present a serious question of constitutional law not appropriately resolved in the courts below. First, the Ninth Circuit reading of the language, purpose and intent of the EEOA to abrogate state immunity is competent and not in conflict with any decision of this Court. Second, the EEOA clearly permits individual actions against state education agencies. The court's analysis is consistent with and controlled by **Fitzpatrick v. Bitzer**, 427 U.S. 445 (1976) and **Hutto v. Finney**, 437 U.S. 678 (1978).

The Petitioners have cast their petition in terms of one issue only, i.e., review of the Ninth Circuit holding that the state's Eleventh Amendment immunity

was abrogated by Congressional enactment of the Equal Educational Opportunities Act, 20 U.S.C. §§1701 et seq. Petitioners do not argue with the proposition that state immunity can be abrogated by the Congress (Pet. at p. 7). They argue only with the application by the court below of the "standard and analysis necessary to determine if Congress has legislatively lifted the State's immunity." (Pet. at p. 7) In other words, the sole claim is that the court below misapplied the standards articulated in **Quern v. Jordan** (1979) 44 U.S. 332, 342-345, and **Fitzpatrick v. Bitzer**, (1976) 427 U.S. 445, 455-456.

Citing **Quern**, petitioners contend that indication of congressional intent to abrogate either "must be in clear language in the statute or clearly evident from the legislative history of the enactment." (Pet., p. 7) They claim that the court below erred in its analysis of the of the

plain meaning of the statute. The court concluded that the California's state educational agencies (and its superintendent) clearly fall within the Act's definition of "state educational agency." (714 F.2d at p. 951) It further observed that Congress explicitly provided in 20 U.S.C. §1706 that individuals could bring actions against these state agencies in the federal courts for violations of the prohibitions and that Congress specifically noted its intent to use its enforcement powers in 20 U.S.C. §1702(b). (714 F.2d at p. 951.)

The only positive argument advanced to justify review is a flat contention that the proviso stated in §1702(b) is, in reality, a Congressional statement not to abrogate state immunity, by expressing intent not to modify or enlarge the scope and power of the federal courts, a wholly novel proposition, supported with nothing

but officious double-talk. ["...imposing a duty and potential liability on the States while maintaining the States' immunity from private suits is consistent...."] (Pet., p. 10). Rationalized to fill the interpretive gap is an even more novel reading of the Act to allow private suits only against "appropriate parties" and suits by the Attorney General exclusively against states. (Pet., p. 12)

Finally, though not covered in the opinion of the court below, Petitioners flatly assert that there is no legislative history of the EEOA on the question of state immunity. Their review cites and extends only the 1974 U.S. Code Congressional and Administrative News and no congressional debate, committee reports, or committee hearings relating to the legislation.

The construction suggested by the petitioners is merely an attempt to inject

grammatical ambiguity into the statute, where none exists. The whole purpose of the EEOA is to set uniform remedial standards for the federal courts to follow in these now-traditional desegregation suits, specifying "appropriate remedies for the orderdy removal of the vestiges of the dual school system." See 20 U.S.C. §1701(b). Rather than limit federal court authority, the §1702(b) proviso of Congressional intent not to modify or diminish the authority of the federal courts is a plain statement negating any construction of the Act as an assertion of congressional power to limit or modify federal appellate jurisdiction under Article III. That subject was a matter of considerable debate. (See for example, the debates on the Education Amendments of 1974, Remarks of Senator William L. Scott re amendment to SB 1539, Congressional Record at p. 14228.)

2. The Eleventh Amendment Is Not a Bar To a Federal School Desegregation Action Against State Authorities.

Regardless of whether subject matter jurisdiction in this case can be based on 20 U.S.C. §1701 et seq., the Eleventh Amendment is not a bar to a federal school desegregation action against state authorities, because those actions are actions for prospective injunctive relief, only ancillarily affecting state treasuries. This case is controlled by this Court's unanimous decision in Milliken v. Bradley, 433 U.S. 267 (1977).

The First Amended Complaint is an action for school desegregation seeking declaration of de jure school segregation liability against state and local defendants grounded, among others, upon this Court's opinions in Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189 (1973); Dayton Board of Education v.

Brinkman, 433 U.S. 406 (1977), and 443 U.S. 526 (1979); and **Penick v. Columbus Board of Education**, 443 U.S. 449 (1979).

Upon a finding of liability, the complaint seeks prospective injunctive remedies not uncommon with those of several other federal courts who have found systemwide de jure school segregation. As such, the relief sought in this case is permitted rather than barred by the Eleventh Amendment. This Court's unanimous opinion in **Milliken v. Bradley**, supra., raised by similar state educational defendants, [2/] permits federal injunctive action requiring compliance, now and hereafter, with the command of

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[2/] The petition for certiorari of the state defendants in **Milliken** was carried by the State Board of Education, the State Superintendent and the Governor of Michigan, the Attorney General and the State Treasurer (See, 433 U.S. 267, 272, footnote 6.)

Brown v. Board of Education, (Brown II), 349 U.S. at p. 301, to operate a racially nondiscriminatory school system, free of the vestiges of de jure segregation.

Even though the court below only mentioned the holding of **Milliken v. Bradley** in footnote and did not rely upon that case, this Court certainly will recognize **Milliken** as controlling on the suitability of state education officials in federal court school desegregation cases. This Court's holding in **Milliken,** regarding the appropriateness of equitable ancillary remedies, including state defendants,when their liability is directly fixed and when they are necessary participants for appropriate Fourteenth Amendment-based equitable remedies.

Reliance upon traditional equitable remedial power of the federal court to vindicate the Fourteenth Amendment school desegregation rights is firmly established

by this Court and should not vary simply because state agencies and officials are defendants. See Brown v. Board of Education, (Brown II), 349 U.S. 294 (1955); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1972); Keyes, supra; Dayton Board of Education v. Brinkman, (Dayton I), supra.

CONCLUSION

Based on the foregoing arguments and authorities, the respondents urge the Court to deny review and hearing on the Petition For Certiorari by summary action. The Eleventh Amendment is no bar to this school desegregation case. Pretrial action on the First Amended Complaint should proceed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of 18 years and not a party to the within above-entitled action; my business address is 4401 Crenshaw Blvd., Suite 311, Los Angeles, CA 90043. On January 3, 1984, I served the within Brief of NAACP Respondents in Opposition to Petition For Writ of Certiorari in Case No. 83-892 on the persons interested in said action by placing true copies thereof enclosed in sealed envelopes with postage thereo fully prepaid, in the United States post office at Inglewood, California, addressed as follows:

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Respondents claim the privilege ofRule 25(a), Federal Rules of Appellate Procedure: "briefs shall be deemed filed on day of mailing if the most expeditious form of delivery by mail . . . is utilized."

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on January 3, 1984 at Los Angeles, California.

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